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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 919

EDITH BOARDMAN COBB, ET AL., *Petitioners*

v.

FRANK GRAHAM JOHNS, JR., ET AL., *Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on August 30, 1968 (Appendix p. 5a).

### OPINIONS BELOW

The Court of Appeals' opinion in this case, No. 21516 (Appendix pp. 1a-5a), was filed on August 30, 1968. To date, it is unreported. The District Court's opinion, Civil Action No. 1953-67 (Appendix pp. 18a-20a), was delivered orally on September 5, 1967, and is also unreported.

## JURISDICTION

The Court of Appeals' judgment was entered on August 30, 1968. A petition for rehearing was filed on September 13, 1968. The Court of Appeals' Order denying the petition for rehearing was filed on October 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals' jurisdiction is derived from 28 U.S.C. §§ 1291 and 1294; the District Court's jurisdiction is derived from D. C. Code § 11-521 (1967 ed.).

## QUESTION PRESENTED

Whether, in testamentary trusts under the wills of testatrices who died domiciled in the District of Columbia in 1928 and 1946, the word "issue" includes only the natural offspring of the life income beneficiaries named in those trusts, or whether, by reason of the retroactive application of an Act of Congress, even though that act expressly provides that it shall have no retroactive effect, the word "issue" also includes an adoptee of one of those life income beneficiaries, thereby depriving the natural offspring of their vested interest in the property without due process of law?

## STATUTES INVOLVED

The following provisions of the 1901, 1951, 1961, and 1967 editions of the District of Columbia Code are printed in the Appendix pp. 27a-30a.

D. C. Code § 395 (1901)

D. C. Code § 16-205 (1951)

D. C. Code §§ 16-222(a), 16-224, 16-225 (1961)

D. C. Code §§ 16-312(a), 16-313, 16-315, 45-812, 45-823 (1967)

## STATEMENT

The material facts are undisputed. They appear in the Joint Appendix which was filed in the Court of Appeals and are designated as a part of the transcript of record here.

Florence Sheffield Boardman executed her will on January 14, 1922. She died on April 25, 1928. Her daughter, Mabel Thorp Boardman, executed her will on April 28, 1944, and died on March 17, 1946. Each will was admitted to probate in the District of Columbia and each will provides for creation of a trust for the ultimate benefit of the "surviving issue" of the four natural children of Florence's only son. (The chart appearing at page 24a of the Appendix correctly reflects the relationship to the testatrices of each of the individuals named therein.)

Essentially, each trust provides (1) that income shall be paid for life to those four grandchildren of Florence (an exception immaterial in this case, is that in Mabel's will a widow of a deceased grandchild was named as a life beneficiary), (2) that as each of those named life beneficiaries dies, the income of his or her share shall be paid to his or her "surviving issue," and (3) that on the death of the last of the named life beneficiaries, principal shall be paid to their "surviving issue," per stirpes.

Of the four grandchildren (1) William Jarvis Boardman, II, died in 1938; he is survived by five natural children who are now living; his wife, Elizabeth, who had an income interest in the trust under Mabel's will, died in 1964; (2) Edith Boardman Cobb is now living and has now living two natural children; (3) Mabel Boardman Randolph died in 1953, leaving no descend-

ants surviving; (4) Florence Boardman Johns died July 7, 1964, leaving no natural children surviving, but leaving Frank Graham Johns, Jr., who was adopted by her on April 2, 1924, and who is now living.

When Florence Johns died the question arose whether her adopted son succeeded to her one-third income interest as "surviving issue," or whether all trust income was thereafter payable to Edith Boardman Cobb and the five children of William Jarvis Boardman, II. A similar question was presented with respect to distribution of trust corpus when Edith Boardman Cobb dies.

The District Court held that the word "issue" in the wills of testators who died before enactment of the present D. C. adoption law in 1954 did not include an adoptee. A panel of the Court of Appeals, with one judge dissenting, reversed.

**Chronology**

1895 D. C. Act passed giving adoptees right to inherit from adopter, see D. C. Code § 395 (1901)

1922 Florence Sheffield Boardman signed her will.

1924 Florence Johns adopted Frank Graham Johns, Jr.

1928 Florence Sheffield Boardman died.

1937 D. C. Act passed creating mutual rights of inheritance between the adopting parents and adopted child, but expressly confirming that the adopted child does not inherit through the adopter, see D. C. Code § 16-205 (1951).

1944 Mabel Thorp Boardman signed her will.

1946 Mabel Thorp Boardman died.

1954 D. C. Act passed affecting the meaning of "child or its equivalent" when used in a will, but not having retroactive effect, see D. C. Code §§ 16-222(a), 16-224, and 16-225 (1961)

1963 Minor revisions in phraseology in 1954 D. C. Adoption Act, see D. C. Code §§ 16-312(a), 16-313, and 16-315 (1967).

1964 Florence Johns died.

## REASONS FOR GRANTING THE WRIT

1. The decision below is patently wrong. A question of great importance in the District of Columbia was decided in a way which clearly conflicts with applicable District of Columbia law. In reversing the District Court below, the two judge majority of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision below unnecessarily encourages litigation in already overburdened courts and it introduces great uncertainty and chaos into an important area of District of Columbia law, the law governing the construction of wills and trusts—an area where predictability and order are essential goals and where testators, their counsel, and the courts have a right to expect a substantial measure of certainty and order.

An earlier panel of the Court of Appeals said:

> . . . the testator must be presumed to have intended the result which the law has theretofore attached to the language he chose to use. *Pyne* v. *Pyne*, 154 F.2d 297, 300 (D. C. Cir. 1946).

The majority below, however, have held that the testator must be presumed to know what meaning future law will attach to the language he chooses to use. This is entirely contrary to the rational and established rules of construction which have long been used to determine a testator's intent. If this petition is denied, the problems involved in construing wills and trusts will be multiplied, not only with respect to pre-1954 instruments containing the word "issue," but also with respect to any wills or trusts containing words of art, such as "heirs, descendants," and "per stirpes."

The majority opinion ignores the overwhelming weight of authority in the District of Columbia:

*Shoemaker* v. *Newman,* 65 F.2d 208 (D.C. Cir. 1933);

*Noreen* v. *Sparks,* 204 F.2d 56 (D.C. Cir. 1953), *aff'g* 103 F. Supp. 588 (D.D.C. 1952);

*Allen* v. *American Security and Trust Co.,* Equity No. 55624 (D.C. Sup. Ct. 1935), *aff'd* and *rev'd* in part on other issues, *sub nom. Hepburn* v. *Winthrop,* 83 F.2d 566 (D.C. Cir. 1936);

*Washington Loan & Trust Co.* v. *Hensey,* Civil Action No. 17,135 (D.D.C. 1943);

*Allen* v. *Reed,* 17 F.2d 666, 667 (1927).

The error is aggravated—

(1) by the statement in the majority opinion that the discussion in *Shoemaker* "was inconclusive and apparently related to intestate distribution rather than testamentary intent" (Appendix p. 2a), and

(2) by the majority's reliance upon *In Re Upjohn's Will,* 304 N.Y. 366, 107 N.E. 2d 492 (1952).

The inadequacy of the legal research with respect to *Shoemaker* and the plain error which characterizes the opinion below is brought out at pp. 7a to 9a of the Appendix; it is also evidenced by the fact that the New York court's opinion in *Upjohn* supports the precise position taken by the petitioners here.

The Court of Appeals below concluded that there was nothing in the wills or in the extrinsic evidence which indicates the testatrices' intent, but then went on to include the adoptee on the basis of public policy in the 1963 D. C. adoption law. The New York court in *Upjohn* included the adoptee only because extensive extrinsic evidence was adduced at trial, including the fact that the will was executed while the testator was a guest in the adoptee's home. Had there been no extrinsic evidence of the testator's intent in *Upjohn,* the New York court would have excluded the adoptee, because it expressly rejected the rule adopted by the majority opinion below in this case. In the absence of an applicable statute this was the rule in the District of Columbia and generally is the rule elsewhere.

In *Noreen* v. *Sparks,* 103 F. Supp. 588 (D.D.C. 1952), *aff'd* 92 U.S. App. D.C. 165, 204 F.2d 56 (1953), for example, the District Court quoted with approval 70 ALR 621, which says:

> It is almost universally agreed that where a provision is made in a will for children of some person other than the testator an adopted child is presumed not to be included unless there is language in the will or there are circumstances surrounding the testator at the time he made the will, which made it clear that the adopted child was intended to be included.

Similarly, in *Wyeth* v. *Merchant*, 34 F. Supp. 785, 790 (W.D.Mo. 1940), *aff'd* 120 F.2d 242 (8th Cir. 1941), the court said:

> An examination of the encyclopedias and text books does not indicate that there is any case which holds that the word "issue," used in a will or other instrument creating a trust estate, which after a life estate in one, is given to his "issue," includes an adopted child.

Also, see 95 C.J.S. Wills § 666(c)(3)(a); *Thompson, The Law of Wills*, § 278 (2d Ed. 1936); and 4 *Bowe-Parker, Page on Wills*, § 34.22 (1961).

The decision of the Court below directly conflicts with every other related decision of that Court, every related reported decision of the United States District Court for the District of Columbia (which also sits as the District's probate court), and with the overwhelming weight of authority in other jurisdictions. The decision even conflicts with the principal authority upon which the majority below rely.

The damaging effect of the majority's decision below is already being experienced in this District. Numerous inquiries have been made by lawyers and other representatives of the city's largest banks and trust companies regarding its effect. For example, under many pre-1954 wills and trusts payments of income and principal to "issue," have for years been made only to natural offspring—with adoptees being excluded. In such cases trustees and executors are justifiably concerned. The decision is having, and if allowed to stand will continue to have, a decided unsettling effect.

2. The effect of the decision below is to confiscate the vested property interests of the natural offspring

of the life beneficiaries named in the trusts under the wills in question and, by disregarding the plain language of an act of Congress, deprive them of their property interests without due process of law.

The Supreme Court of Canada, when presented with a similar case dealing with the effect of modern legislation on the rights of adopted children under old wills, held that such legislation could not affect prior wills, unless the legislature plainly and explicitly manifested that intent, since legislation designed to affect earlier rights of adoptees would be confiscatory with respect to the rights of natural offspring. *Re Gage,* 31 D.L.R. 2d 662 (1962).

The majority below look to the 1963 D. C. adoption statute to determine the District's general policy toward adopted children and apply that policy in determining the intent of the testatrices here who signed their wills and died long before that policy was first enacted by Congress in 1954.

The existing provisions of the D. C. adoption law, D. C. Code §§ 16-312(a), 16-313, and 16-315 (1967), which reflect the changes made in 1954, and the statutory development of that law, which is set forth at pp. 12a to 14a of the Appendix, underscore the error of the decision below.

The 1954 changes in the D. C. adoption law, for the first time, gave adoptees the right to take both "from and through" their adoptive parents and defined the word "child" in a will to include an adopted child. The majority says these changes provide "a clear indication of this jurisdiction's general policy," but they overlook or intentionally ignore (1) D. C. Code § 16-

315 (1967), which expressly directs that *these new provisions shall have no retroactive effect,* and (2) H. Rept. No. 1347, 83d Cong. 2d Sess. p. 7 (1954), which says that persons objecting to the provisions enacted in 1954 "can change their wills."

It is clear error and a serious distortion of Congressional purpose for the majority below to have given the 1954 statute retroactive effect to wills of persons long deceased.

The reason Congress made the 1954 provisions non-retroactive is obvious. Income and remainder interests such as those involved here become vested when the testators involved die (see D. C. Code § 45-812 and § 45-823 (1967), and *American Security and Trust Co.* v. *Sullivan,* 72 F.Supp. 925, 931 (D.D.C. 1947), citing *Doe* v. *Considine,* 6 Wall 458 (1868)). Those vested interests should not be cut off by a change in an adoption law.

In *Irving Trust Co.* v. *Day,* 314 U.S. 556 (1942), Mr. Justice Jackson, at page 562, says there is no deprivation of property without due process of law where the New York statute involved in that case was enacted (1) before the testator whose will was involved there died, and (2) before he changed his will—because the plaintiff in that case had no vested interest in the property in question. The implication is clear that had the property interest been vested—as it was here—the New York legislation would have been declared unconstitutional or a different result would have been reached, as in *Re Gage,* 31 D.L.R. 2d 662 (1962).

The applicable decisions in other jurisdictions are to the same effect—holding that if an instrument "em-

ploys a term such as children or issue, which at the time the instrument is signed and becomes effective has a meaning exclusive of adoptees, the fact that by subsequent statute an adoptee is elevated to the status of a child or issue of the adopter will not alter the exclusionary instrument." *National City Bank* v. *Mitchell,* 13 Ohio App. 2d 141, 234 N.E. 916 (1968); and the same result was reached in *Gutman* v. *Safe Deposit & Trust Co.,* 198 Md. 39, 81 A.2d 207 (1951); *Newsome* v. *Scott,* 200 Va. 833, 108 S.E. 2d 369 (1959); *Merson* v. *Wood,* 202 Va. 485, 117 S.E. 2d 66 (1966); *Amoskeag Trust Co.* v. *Preston,* 107 N.H. 330, 222 A.2d 158, 161 (1966); *In re Trust of Pennington,* 421 Pa. 334, 219 A.2d 358 (1966); and *Security National Bank* v. *Willim,* 153 S.E. 2d 114 (W. Va. 1967).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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